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**JOHN M. BARROWS**  
EXECUTIVE DIRECTOR

February 17, 2009

Chairman and Members  
Senate Judiciary Committee  
State Capitol

**Senate Bill 349 – Senator Tutvedt**

The Montana Newspaper Association, which represents Montana's daily and weekly newspapers, is strongly opposed to Senate Bill 349.

Attached I have included a detailed explanation of our opposition, as outlined by our attorney Mike Meloy. Mr. Meloy represented the media in two successful Supreme Court Challenges dealing with the specifics included in this bill, Great Falls Tribune v. Day and Great Falls Tribune v. PSC.

The bill has a number of serious defects... both in the way which it is constructed and in the Constitutional implications it raises.

We believe there are sufficient legal and Constitutional issues in this bill to warrant a Do Not Pass from this Committee.

A handwritten signature in cursive script, appearing to read "John Barrows".  
John Barrows  
Executive Director

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## MEMORANDUM

**FROM:** Mike Meloy

**TO:** John Barrows, MNA

**Re:** *Senator Tutvedt's S.B. 349*

SB 349 amends three existing statutes: §§18-2-503, 18-4-126 and 60-2-137, MCA. Section 18-2-503 is contained in the chapter dealing with public construction contracts, specifically "alternative project delivery contracts." These are governmental contracts in which the contractor acts as the manager of the project (as opposed to a government employee), the builder acts as the designer as well as builder and where the contractor also deals unilaterally with subcontractors.

Section 60-2-137 deals with design build contractors for public roads. These are roadway contracts in which the designer-builder agrees to design and build a highway, structure or facility for a public entity.

Section 18-4-126 is the main section guaranteeing public access to documents submitted by a bidder on contracts for supplies and services for all public bodies, state and local.

The existing §18-4-126 requires, without qualification, that all information submitted by a prospective bidder in support of the bid is public information.

The amendments to §18-2-503 and §60-2-137, provide internal references for alternative project delivery contracts and design-build contracts, back to the public access provision of §28-4-126. I assume this was done because the statutory process for those two types of contracts are presently silent as to whether documents submitted are covered by the provisions of §18-4-126.

However, since §18-4-126 applies generally to procurement information for all contracts for state and local governmental supplies and services, the amendments contained in Section 2 of the bill have widespread application.

SB 349 suffers from two significant deficits: one of statutory construction and one of constitutional dimension.

The statutory construction deficit is caused by the existing requirement of §18-4-126 that procurement information is available to the public under §18-4-304. Section 18-4-304 requires all information submitted in connection with a bid to be public except for trade secrets defined in the Uniform Trade Secrets Act, safety matters and other constitutional protections. The new language to be amended into §18-4-126 adds "confidential or proprietary" information, including "business plans, marketing plans or strategies, customer lists, contracts, sales data, revenue, or other financial information." This, of course, goes far beyond the narrow definition of trade secrets contained in the Uniform Trade Secrets Act. So, the question becomes, how do you know which documents are public and which are not? Do you follow the provisions of §18-3-304 or the new §18-4-126.

The constitutional infirmity is more profound. Article II, Section 9 of the Montana Constitution requires all government documents to be open except where the demands of individual privacy clearly exceed public disclosure. Under this section, a document may not be withheld unless it contains individually private information and then, only when it's clearly more important to protect privacy than to permit public disclosure. The amendments to §18-4-126 do not permit application of this balancing test. The amended section would afford blanket confidentiality for all information designated by the bidder as "trade secret or proprietary information."

There are two Montana Supreme Court decisions bearing on the issue. In *Great Falls Tribune v. Day*, 289 Mont. 155, 959 P.2d 508 (1998) the Court struck down the provisions of §18-4-304 that prevented public inspection of bidding documents until after the bid had been let. In *Day*, the Court rejected the Department of Corrections' argument that bidders had a protectable privacy interest in the written bid materials because the statute required disclosure of these documents after the bid was let. The court did recognize that there may be an exception from disclosure for "legitimate trade secrets" or matters of "individual safety" based on its decision in *Mountain States Telephone and Telegraph v. PSC*, 194 Mont. 277, 634 P.2d 181 (1981). Shortly after the *Day* decision the legislature amended §18-4-304 to permit the withholding of trade secrets and individual safety information.

However, the Supreme Court revisited the *Mountain States* decision in *Great Falls Tribune v. PSC*, 319 Mont. 38, 82 P.3d 876 (2003) and overruled *Mountain States* finding that corporations do not have a right of privacy and their documents may not be withheld from public inspection based on the privacy exception of Article II, Section 9. Therefore, the underpinning of the Court's determination that trade secrets might provide an exception to the right-to-know provisions of the Constitution was eliminated.

In *Great Falls Tribune*, the Court re-evaluated the decisional law related to disclosure of trade secrets in the custody of some governmental entity. First, the Court ruled that corporations do not enjoy the right of privacy contemplated by the open records provisions of Article II, Section 9 of the Constitution. Second, the Court

announced that there is a presumption that all records held by the government are open for public inspection. And, that the person seeking to assert a non-privacy

exception to public disclosure had an affirmative duty to establish the basis for withholding disclosure.

Moreover, the Court did not conclude that trade secrets were protected from disclosure if voluntarily given to the governmental agency. The court did recognize that the secrecy bar may be lower if the government *requires* certain information to be filed. However, if the disclosure of trade secrets is made voluntarily, with the understanding that it may be public, then there can be no confidential protection for this information.

Finally, the Court in *Great Falls Tribune* did not define a trade secret but recognized that there may be due process considerations attendant to private property in the form of a trade secret or other proprietary information.

The constitutional deficits in SB 349 are legion.

First, it doesn't recognize the Supreme Court rule that documents filed by bidders are presumptively available for public access. Second, it doesn't impose upon the person seeking to protect some private property interest to affirmatively establish by supporting affidavit making a prima facie showing that the materials constitute property rights which are protected under constitutional due process requirements. And, it must be more than conclusory. It must be specific enough for the agency and the public to clearly understand the nature and basis of the claim to confidentiality. Third, if the agency soliciting the bid doesn't require the filing of a particular document which the bidder claims to be proprietary, and the bidder files it, nonetheless, any due process rights are waived and any statutory change should give notice to the bidder of this result. Finally, there still has to be a balancing of the due process rights with the right to know. Flat proscriptions against disclosure are unconstitutionally infirm.

One last observation, these statutes deal generally with procurement of goods and services. It is inconceivable that any bidder would have to submit trade secret information in order to have a bid considered by a public agency. Even when submitting an alternative project delivery contract bid, the information required by §18-2-503 (2) is not proprietary. Even the bidders, financial health is not a trade secret.

These contracts involve enormous expenditures of public funds. Public scrutiny of these expenditures is paramount. Any statute which seeks to keep information related to the bid confidential must be very narrowly drawn to allow transparent examination of the governmental process.